

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 028612/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 31/5/24
SIGNATURE

In the matter between:

**THE MINISTER FOR THE DEPARTMENT OF THE
WATER AND SANITATION**

Applicant

and

**BATLHOKOMEDI MANAGEMENT SERVICES CC
AND SIX OTHERS**

1st to 7th Respondents

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 31 May 2024.*

Summary: Urgent application seeking an extension of declaration of invalidity. Principles applicable to an application of this nature considered. The Court had declared a decision to award a tender to be invalid and set aside the service level agreement (SLA) entered into as a result of the tender process.

For a period of nine months, the Court suspended the declaration of invalidity as well as the setting aside of the SLA without stating what the applicant should do to regularise the defect that led to the invalidity. Barely 11 days before the expiry of the suspension period, the applicant launched the current application seeking to extend the suspension of invalidity for a further period of six months. Held: (1) The application is struck off the roll due to lack of urgency (2) The applicant is to pay costs on party and party costs scale C which costs include the costs of a senior counsel.

JUDGMENT

MOSHOANA, J

Introduction

[1] To my mind, this application agitates an important question of the difference, if any, between a declaration of invalidity contemplated in section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 (Constitution) and a judicial review of an administrative action within the contemplation of Promotion of Administrative Justice Act (PAJA)¹. At this early stage of this judgment, it is important to set out what section 172(1)(a) of the Constitution provides. It states, when deciding a constitutional matter within its powers, a Court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

[2] Section 172(1)(b)(ii) of the Constitution provides that a Court may make any order that is just and equitable, including an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. Section 6(1) of PAJA specifically provides that any person may institute proceedings in a Court or a tribunal for the judicial review of an

¹ Act 3 of 2000

administrative action. Section 1 of PAJA defines what an administrative action means.

[3] Section 8(1) of PAJA provides that the Court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including certain orders outlined in subsections (1)(a)-(f). Conspicuously present in those competent orders is an order of setting aside the administrative action concerned. Conspicuously absent from the competent orders is the order to suspend the review order on any conditions.

[4] Section 167(7) of the Constitution informs us that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. In order to place the present application in its proper context, section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) provides that national legislation must be enacted to give effect to rights guaranteed in section 33(1). PAJA is such a national legislation.

[5] Against the above backdrop, the application that serves before me has as its genesis a PAJA review instituted by Batlhokomedi Management Services CC (Batlhokomedi). Flowing from the said review application, an agreed draft order was adopted by my learned sister Van Der Schyff J. That order contained in it, an order that the tender that was declared to be constitutionally invalid with a consequence that the SLA was set aside, its declaration of invalidity and the setting aside of the SLA was suspended until 31 May 2024.

[6] As it shall be demonstrated later in this judgment, this Court takes a view that the Court beaoned by Van Der Schyff J was not faced with a constitutional matter but a PAJA review. As such, the Court was confined to the reliefs contemplated in section 8 of PAJA. However, this Court not being a Court of appeal is not empowered to set aside that order. However, in my view, this Court is entitled to refuse to grant the relief sought in this instance if it is not satisfied that the applicant is not without a substantial redress in due course.

Background facts pertinent to the application

[7] Regard been had to the introduction outlined above, the salient facts for this application are briefly that on or about 15 July 2022, Batlhokomedi as a tenderer for the advertised 36 months security tender to be awarded by the department of the water and sanitation, was advised that it was unsuccessful. Aggrieved by such a decision, Batlhokomedi launched a PAJA review. The deponent contended that the irregularities outlined in the founding affidavit offended section 6(2)(b); (c); and (i) of PAJA. It is apparent that the applicant conceded that its award of the tender was reviewable in terms of the section 6(2) grounds as punted for by Batlhokomedi.

[8] This concession led to an agreed order drafted in the manner in which it was drafted by the parties involved and adopted by Van Der Schyff J. It suffices to mention at this stage that the suspension was not one contemplated in section 172(1)(b) of the Constitution because it was not made in order to allow the applicant to correct the defect. On the applicant's version in the 9 months suspension period, without being so ordered, it attempted to redo the tendering process to no avail. On Batlhokomedi's version, the applicant did not do enough and ignored certain available processes.

[9] Having failed to rerun the tender process, 11 days before the lapse of the ordered suspension, the applicant launched the present application and sought amongst others, the following relief on an urgent basis:

“That the period of suspension of the declaration of invalidity and the setting aside of the award Tender W[...] for the rendering of private security to the Department of Water and Sanitation nationally for a period of 36 months as per the Order granted by Honourable Madam Justice Van Der Schyff dated 4 September 2023, be extended for a further period of 6 months.”

[10] Batlhokomedi opposes the relief sought on the basis that it is not urgently needed and that this Court lacks the necessary jurisdiction to amend or vary the remedy fashioned by Van Der Schyff J.

Analysis

[11] Before hearing this application, this Court expressed its discomfort with regard to the principles applicable to the request sought by the applicant. Amongst a myriad of submissions, laid a submission that the *Allpay* judgment is authority for the proposition that in a tender situation a suspension of invalidity is appropriate. This Court disagreed that the situation appertaining this matter is on all fours with *Allpay*.

[12] In *Allpay* the Court specifically called into aid section 172(1)(b)(ii) powers. It specifically stated that in line with the empowering section it may suspend until any new payment process is operational. Its order was specific and it stated that the declaration of invalidity was suspended pending the decision of SASSA to award a new tender after completion of an ordered tender process. To my mind, this type of a suspension accords with the letter of section 172(1)(b)(ii).

[13] This Court takes a view that the suspension in *casu* was an incompetent order in the first place. Seized with a PAJA review, Van Der Schyff J was, in my view, confined to the remedies contemplated in section 8 of PAJA. It is indeed so as confirmed in *Allpay* that remedial correction is grounded in section 172(1)(b)(ii) and is a logical consequence flowing from invalid and rescinded contracts. The default position is one that requires the consequences of invalidity to be corrected or reversed.

[14] Unfortunately in *casu* no corrective measures were ordered to justify the exercise of suspension powers contemplated in the empowering section. As pointed out above, although Batlhokomedi, in its PAJA review contended constitutional invalidity, such was clearly related to section 6(2)(i) of PAJA because, it alleged that section 217 of the Constitution was breached.

[15] On application of the principle of subsidiarity, a litigant cannot place direct reliance to the provisions of the Constitution in an instance where an Act of Parliament is in place. In terms of section 217(3) of the Constitution, national legislation must be implemented. The Preferential Procurement Policy Framework

Act, 200 (PPPFA)² is the national legislation contemplated. Nevertheless, even if it could be argued that alleging a breach of section 217 of the Constitution amounts to raising a constitutional matter within the meaning of section 67(7), the difficulty in this matter is that the order does not suspend the declaration of invalidity in order to correct the defect. This failure is fatal in my view because it defeats the very unique purpose of the powers in the section. What becomes the worth of suspending an invalidity without a concomitant order of correcting the defect. In all instances where section 172(1)(b)(ii) powers were invoked corrective measures were ordered to legitimise the situation that seeks to promote unlawfulness.

[16] On the face of it, the invalidity order was suspended for no apparent reason. This is the basis of the discomfort expressed to counsel for the applicant. Veritably, the question is should this Court extend the period what would be the purpose for that particularly where this Court is not empowered to amend a final order. Clearly, when the suspension was made, it was not for the purposes of correcting the defect. Even if it may be argued that applying the interpretative tools to the order, this Court cannot emerge with a compliant order. It is only an appeal or possibly a variation order that could cure the incompetency.

[17] Having raised that discomfort, Mr Seneke SC appearing for the applicant, directed me to several Constitutional Court authorities. In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (New Nation)*³, the constitutionality of certain sections of the Electoral Act were challenged. The Constitutional Court having declared those sections to be constitutionally invalid, made the following pertinent order:

“The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.” [Own emphasis]

² Act 5 of 2000.

³ 2020 (6) SA 257 (CC).

[18] This order, in my view, accords with the provisions of section 172(1)(b)(ii) of the Constitution. The Constitutional Court stated, as it should, the purpose of the suspension of the invalidity. In *Speaker of the National Assembly and Others v New Nation Movement NPC and Others (Speaker II)*⁴, the Constitutional Court was faced with an extension of a suspension of invalidity. Unlike in this matter, the order in *New Nation* was specific as to the purpose of the suspension. In dealing with the power to grant an extension, which must be granted sparingly, the Court stated the following:

“A proper case justifying the need for an extension must be made out because the effect of suspending the operation of a declaration is to preserve law which has been found unconstitutional and void, as was the case here, to afford Parliament opportunity to remedy the defect.”

[19] The Court in *Speaker II* was at pains to justify an extension of a suspension and ultimately laid the following important basis:

“This view should not be mistaken for tolerance of Parliament’s tardiness or failure to meet its deadlines. This Court was merely cognisant of the nature of the matter, which clearly transcends the interests of the parties, and implicates the interests of the general public and our democracy. These factors, in my view, warranted the grant of the extension as a just and equitable remedy and it was in the interests of justice to make an order towards that end.”[Own emphasis]

[20] The matter before me does not transcend the interests of the parties and does not implicate the interests of the general public and our democracy. It is more of a self-serving of interests. It seeks to serve the selfish interests of the applicant, to continue paying public funds out of an unlawful contract. To my mind an extension is not there for the mere taking. A proper case for the need of the extension must be made. In my view only a purposed suspension order is capable of being justified. Mr Seneke SC directed the attention of this Court to another judgment of the

⁴ 2023 (7) BCLR 897 (CC).

Constitutional Court of *Speaker of the National Assembly and Another v New Nation Movement NPC and Others (Speaker I)*⁵.

[21] In *Speaker I*, the Court suggested certain factors that must be considered in determining whether to grant extension. Those are (a) the sufficiency of the explanation provided for failing to comply with the original period of suspension; (b) the potential prejudice that is likely to follow if an extension is or is not granted; and (c) the prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline. Of significance, the Court emphasised that the power must be exercised sparingly in following the earlier judgment of *Minister of Justice and Correctional Services v Ramuhovhi (Ramuhovhi)*⁶.

[22] In *Ramuhovhi*, the extension was to afford Parliament an opportunity to correct the defect. The Court in *Ramuhovhi* refused to grant the extension on the basis that the extension will serve no purpose given the measures put in place in the event the invalidity was not corrected. In *casu*, this Court takes a view that the extension will serve no purpose because the applicant has already issued notices of terminations. The question then becomes what will be in place during the suspension period if the contracts declared invalid and set aside no longer exists. This will imply that if the applicant still requires the services of a private security, it could invoke the procedures in the Supply Chain Management (SCM), guided of course by the urgent need of such services.

[23] Mr Seneke SC placed heavy reliance on what was said in *Speaker I* at paragraph 61 regarding the importance of obeying Court orders. The situation that obtained in *Speaker I* does not obtain in *casu*. In more specific terms, the speaker was ordered to correct the defect within 24 months. In *casu* the suspension is not coupled with any opportunity to correct the defect. After 31 May 2024, the effect of the lapse of the suspension of the invalidity will simply be that there is no more a private security tender. Therefore, if the applicant still requires those services, there

⁵ 2022 (9) BCLR 1165 (CC).

⁶ 2020 (3) BCLR 300 (CC)

is nothing that will prevent it to engage its SCM optimally in order to address what Mr Seneke SC referred to as possible vandalism.

[24] The applicant does not necessarily require this extension in order to address the alleged potential vandalism. The applicant is not exposed to any non-compliance with a Court order. The order did not direct the applicant to regularise anything. This, to my mind, is inevitable in a situation where a Court is asked to review. Once it does so, section 8 of PAJA directs what ought to happen. If this Court were to extend the suspension of invalidity, in instance where the extension is purposeless, this Court would be using its extension powers liberally as opposed to sparingly as decreed.

[25] For all the above reasons this Court is not satisfied that a proper case justifying the need to extend has been made. The applicant does not deserve a continuation of this 'reprieve'. It must simply optimally deploy its SCM policy now that piggy-bagging has proven to be of no use as alleged and argued. Even though this matter was heard as one of urgency, this Court is not satisfied that an urgent relief is necessary in the circumstances where there are substantial redresses in the SCM. This Court should not allow being abused in circumstances where a clear solution lies in the hands of the applicant. An argument that the applicant has no alternative remedy other than to approach this Court to extend a purposeless suspension, which is incapable of breeding contempt order, must be rejected.

[26] Accordingly, the appropriate order to make is to strike this matter off the roll for lack of urgency. What remains is the issue of costs. Counsel for Batlhokomedi Mr Els SC strenuously argued that a punitive costs order must be made. I do not believe that this is a case involving opprobrium. The appropriate cost order is one of party and party costs to be taxed or settled at scale C, which costs include the costs of a senior counsel.

[27] For all the above reasons, I make the following order:

Order

1. The application is struck off the roll for want of urgency

2. The applicant must pay the costs of the respondents on a party and party scale to be taxed or settled at scale C and the costs should include the costs of employing a senior counsel.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant: Mr T Seneke SC, Ms M Magagane and CT
Malatji

Instructed by: State Attorney, Pretoria

For Respondent: Mr APJ Els SC

Instructed by: Hibbert Attorneys, Pretoria

Date of the hearing: 30 May 2024

Date of judgment: 31 May 2024